No. 98-1189

In The

Supreme Court of the United States

October Term, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL LEGAL FOUNDATION

In support of *Respondents*

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INTEREST OF AMICUS CURIAE[1]

The National Legal Foundation (NLF) is a public interest law firm with fourteen years experience litigating First Amendment issues before various state and federal courts, including this Court. In addition, the NLF's in-house think tank, the Minuteman Institute conducts research into historical and jurisprudential issues relating to the First Amendment and the legal and political theories underlying both the Founding of our nation and contemporary legal debates.

The NLF deals daily with the issues presented by this case. The NLF believes, given the split in the federal Courts of Appeals on these issues, that a proper resolution of this matter is of great significance to America's students and to all citizens who speech might be compelled. Further, the decision reached by this Court will directly impact the course of future litigation that the NLF undertakes in the public interest.

The NLF believes that its insight into the issues presented by this case will be of assistance to this Court.

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[1] Counsel of record to the parties in this case have consented to the filing of this brief through blanket consent letters which have been filed with the Clerk. No counsel for any party authored this brief in whole or in part. To date no person or entity, other than the regular donors of the amicus curiae have made any monetary contribution to the preparation or submission of this brief. A grant application is pending with the Alliance Defense Fund for work done on this brief. The Alliance Defense Fund is a 501 c 3 organization that helps public interest law firms and private attorneys fund their work in the public interest. The Alliance Defense Fund did not control the content of this brief, did not help author it, and did not even see it prior to completion.

SUMMARY OF THE ARGUMENT

The panel decision of the Seventh Circuit was correct in holding that the mandatory student fees program at the University of Wisconsin-Madison violates the First Amendment of the United States Constitution. This conclusion can be reached either under the *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507 (1991), test or by relying on first principles.

Under both the views of the Founding Fathers and this Court's precedents, the student fees, absent an opt-out provision for objecting students, constitute impermissibly compelled speech. In analyzing whether speech is impermissibly compelled, it is important to consider the freedom of conscience. Failure to take the freedom of conscience into account has led several jurists to wrong conclusions about mandatory student fee programs.

ARGUMENT

I. THE UNIVERSITY OF WISCONSIN-MADISON'S MANDATORY STUDENT FEE IS AN UNCONSTITUTIONAL COMPULSION OF POLITICAL AND IDEOLOGICAL SPEECH.

At the heart of this case is a proposition that was settled long ago by those who founded this nation: government cannot compel individuals to endorse or pay for ideas that violate their freedom of conscience. The three judge panel that decided the case at the Seventh Circuit saw the case this way. *Southworth v. Grebe*, 151 F.3d 717, 718 (7th Cir. 1998) (hereinafter, *panel decision*). Even those judges who dissented from the denial of rehearing *en banc* wrote nothing that would indicate disagreement with this proposition; rather they simply found no compelled speech. *Southworth v. Grebe*, 157 F.3d 1124 (7th Cir. 1998) (Opinions of Rovner, J. and of Wood, J. each dissenting from denial of rehearing *en banc*.) (Hereinafter, *rehearing denial*).

Thus, whether one agrees with the panel or with the rehearing dissenters as to the proper application of *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) and *Keller v. State Bar of California*, 496 U.S. 1 (1990) or of the test in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991),[2] all can agree that compulsion *vel non* is the heart of the controversy. The panel's key discussion of compulsion takes place in the context of the *Lehnert* test's third prong. *Southworth, panel decision*, at 730-31. However, it is equally valid as a stand alone discussion. Thus, should this Court find compulsion—and the main function of this brief is to demonstrate the existence of compulsion—it should conclude that the University of Wisconsin-Madison's (UW-Madison) mandatory student fee policy violates the First Amendment. This Court could so conclude either by embracing the panel's use of *Lehnert* or by resorting to first principles.

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[2] As the panel opinion pointed out, there is also a split in the circuits as to the proper application of *Abood* and *Keller*. *Southworth, panel decision*, at 723. Judge Rovner objected to the use of the *Lehnert* test, believing that it was not controlling. *Southworth, rehearing denial*, at 1126-27.

As will be discussed below, the panel's position is supported by this Court's precedents concerning compelled speech and demonstrates a proper understanding of first principles. The panel was thus correct when it characterized the UW-Madison program as compelled speech. On the other hand, Judge Wood's opinion, dissenting from the denial of rehearing *en banc*, demonstrates a misunderstanding of first principles in that she

> take[s] issue with the panel's fundamental premise—that the fee is a compelled subsidy of speech itself, rather than a compelled subsidy of a neutral forum for speech. In my view, there is a dispositive difference for First Amendment purposes between requiring someone to fund a forum, and requiring someone to support the speech of any or all speakers who come to use the forum.

Southworth, rehearing denial, at 1128.

The examination of this "dispositive" issue must compare the approach of the panel opinion and that of Judge Wood's opinion. This brief will also examine the approach of Judge Rovner, who also dissented from the denial of rehearing *en banc,* and the approach of the Ninth Circuit in *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032 (9th Cir. 1999). *Rounds* is significant in that it is a mandatory student fee case decided after the panel decision was issued.

In its discussion of compelled speech, the panel quoted Thomas Jefferson from *Abood's* footnote 31: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." *Southworth, panel decision*, at 730 (quoting *Abood*, 431 U.S. at 234 n.31). It is important to note the larger context of the *Abood* footnote.

The discussion of compulsion in *Abood* to which the Jefferson quote is appended as a footnote is as follows:

> The fact that the appellants are compelled to make, rather than prohibited from making,

> contributions for political purposes [as was the case in Buckley v. Valeo, 424 U.S. 1 (1976)] works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. See Elrod v. Burns, [427 U.S. 347, 356-57 (1976)]; Stanley v. Georgia, 394 U.S. 557, 565; Cantwell v. Connecticut, 310 U.S. 296, 303-304. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:
>
> > "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642.
>
> These principles prohibit a State from compelling any individual to affirm his belief in God, Torcaso v. Watkins, 367 U.S. 488, or to associate with a political party, Elrod v. Burns, supra; see 427 U.S., at 363-364, n. 17, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.
>
> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining

> representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Abood 431 U.S. at 234-36 (footnotes omitted).

Footnote 31 occurs at the end of the first sentence in the quotation above. By examining the fuller *Abood* context, it is clear that the sentiment contained in the Jefferson quotation utilized in the panel opinion is fully consistent with the continuing jurisprudence of this Court, i.e., the panel did not simply extract some long-abandoned view of Jefferson and attempt to use it to prop up a result for which it could find no better support.

Quite to the contrary, as the *Abood* Court pointed out, there is a long line of cases which echo exactly the concerns of Jefferson. In fact, the concerns about compelled speech in the factual context of this case are more real today than ever before. As the panel pointed out: "The compulsion which Madison [read Jefferson] condemned is of heightened concern following *Rosenberger* [*v. Rector and Visitors of the Univ. of Va.*], 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) . . . ." *Southworth, panel decision* at 730 n.11.

The heightened concern occurs in the context of mandatory student activities fees because the entire fee is not being challenged. Appellees are not claiming that fees *cannot* be collected. Instead, they are merely contending that they cannot be *compelled* to fund beliefs with which they disagree. *Id.* at 721-22. Since fees *will be* collected, the panel had it exactly right when they wrote:

> If the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in political and ideological activities—that is the only way to protect the individual's rights.

Id. at 730 n.11.

Thus, the panel is correct in its realization that the concerns of Jefferson are pertinent today and indeed, more, so than ever under the facts before the Court. Moreover, the panel's discussion also provides the basis to reconcile its holding with that of *Rosenberger*. Rather than "the panel's decision appear[ing] to create a serious conflict with the premise underlying [this] Court's decision in *Rosenberger*" as Judge Wood claims, *Southworth, rehearing denial,* at 1127, the panel correctly applied this Court's precedent to the factual situation anticipated by Justice O'Connor in her *Rosenberger* concurrence. In a passage quoted in part by the panel, *Southworth, panel decision* at 722, Justice O'Connor wrote:

> Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. See, e. g., *Keller v. State Bar of California*, 496 U.S. 1, 15 (1990); *Abood v. Detroit Board of Education*, 431 U.S. 209, 236 (1977). . . . While the Court does not resolve the question here, the existence of such an opt-out possibility not available to citizens generally, provides a potential basis for distinguishing proceeds of the student fees in this case from proceeds of the general assessments in support of religion that lie at the core of the prohibition against religious funding, and from government funds generally. Unlike monies dispensed from state or federal treasuries, the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee. The government neither pays into nor draws from this common pool, and a fee of this sort appears conducive to granting individual students proportional refunds. The Student Activities Fund, then, represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students.

Rosenberger, 515 U.S. at 851(O'Connor, J., concurring)[3]

The panel's analysis is simple and correct. Mandatory fees do not create a conflict with *Rosenberger* provided students are allowed to opt out of political and ideological funding. *Southworth*, *panel decision* at 730 n.11.[4]

Thus there can be no real question but that the UW-Madison program, absent an opt-out provision, constitutes the kind of compelled speech that concerned Jefferson and that this Court has found to be unconstitutional in a variety of contexts, including the cases canvassed in *Abood* (*supra*, pp. 4-6).

II. THE ISSUE BEFORE THIS COURT MUST BE EXAMINED IN LIGHT OF THE FREEDOM OF CONSCIENCE

A. THE DISPOSITIVE ISSUE IS NOT FORUM-CREATION

While it seems clear that the UW-Madison program falls squarely within parameters of unconstitutional compulsion, there remains the argument advanced by Judge Wood that

> there is a dispositive difference for First Amendment purposes between requiring someone to fund a forum, and requiring someone to support the speech of any or all speakers who come to use the forum.

Southworth, *rehearing denial*, at 1128.

The prior discussion of the panel's handling of *Rosenberger* and of Justice O'Connor's anticipation of the problem now before the Court could, without more, dispose of Judge Wood's contention. However, there is another line of reasoning which supports the panel's opinion and undermines Judge Wood's position. Once

[3] The panel also pointed out the similar point made by the *Rosenberger* majority. *Southworth*, *panel decision*, at 722, (quoting *Rosenberger*, 515 U.S. at 840).

[4] Any difference in the administration of the student funds in *Rosenberger* and the student funds at UW-Madison does not impact the point being made here: the necessity of an opt-out provision for political or ideological speech.

again, this line of reasoning starts with the Founders and continues to this day in the precedents of this Court. This line of reasoning covers much of the same jurisprudential territory covered by the discussion of *Abood's* footnote 31, above. It requires, however, covering that territory from an additional vantage point. After all, Judge Wood herself interacted with *Abood* and *Keller* and found them of "only limited help," *Southworth*, *rehearing denial*, at 1129, because she believed that " a forum-creation analysis rather than a compelled speech analysis is appropriate." *Id.*

The added vantage point that is needed is a freedom of conscience analysis. While a compelled speech rubric and a freedom of conscience rubric are clearly related, something crucial gets missed when the freedom of conscience lens is not peered through. This is true of Judge Wood's position, as will be examined here, and of Judge Rovner's position and of the position of the Ninth Circuit in *Rounds*, both of which will be examined *infra*.

The importance of the freedom of conscience to our Founders is perhaps best exemplified by James Madison's famous *Memorial and Remonstrance*. 8 *The Papers of James Madison* 298 (Robert A. Rutland, et al., eds, 1973)

While there are clear differences between the UW-Madison program and the proposed 1785 Virginia "Bill establishing a provision for Teachers of the Christian Religion" against which Madison wrote, the principles apply with equal force to both situations. Indeed, as will be noted below, this Court has applied the principles of the *Memorial and Remonstrance* in several different contexts.

As is the case with the student fees at issue in the instant case, Madison faced a program which proposed to collect fees, i.e. taxes, from all citizens and disburse them in a manner violative of the freedom of conscience.[5] Indeed, under the wisdom of the

[5] Perhaps the key difference has already been pointed out by Justice O'Connor in her concurring opinion in *Rosenberger*. In the portion of her opinion quoted earlier, Justice O'Connor noted that the possibliity of opting out is a possibility in the case of the mandatory fees but would not be a possibility in a case involving

Memorial, UW-Madison's fee provisions allowing political and ideological funding would never have been adopted. Certainly, its wisdom at least mandates an anti-compulsion opt-out.

From a document replete with fundamental principles of the American experiment in ordered liberty, the excerpts which follow below warrant careful attention, both because they have continued animate this Court's jurisprudence and because they are particularly pertinent to the instant case. Of course, this Court is no stranger to the *Memorial and Remonstrance* nor to the debate over how to interpret it in an Establishment Clause context. See, e.g., the opinions of Justices Thomas and Souter in *Rosenberger*. *Rosenberger*, 515 U.S. 819.

However, we note that what Madison wrote about the freedom of conscience applies beyond the question of establishment of religion. Clearly, it applies to questions of the free exercise of religion and extends to freedom of thought and belief of a type not normally brought under the heading "religioun." This was made clear by this Court in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943):

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Id. at 642.

Therefore as we look at the following language from Madison's *Memorial and Remonstrance*, we can take the keystone principle of freedom of conscience and apply it to the case now before this Court. In fact, the general principle may well be easier to apply to contexts other than establishment of religion. Madison wrote in part:

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taxes. *Rosenberger*, 515 U.S. at 851(O'Connor, J., concurring). We will return to the significance of this *infra*.

> we hold it for a fundamental and undeniable truth, "that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men . . . .
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> . . . .
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> . . . . If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of Conscience." Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us . . . .
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> . . . .
>
> . . . . "[t]he equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the "Declaration of those rights which pertain to the good people of Virginia, as the basis and foundation of Government," it is

> enumerated with equal solemnity, or rather studied emphasis.

8 *The Papers of James Madison* 298, 299-300, 304 (Robert A. Rutland, et al., eds, 1973).

The point, at bottom, is that compelling funding in violation of conscience is antithetical to the principles upon which this nation was founded. Madison stated this in the strongest of terms:

> it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it.

Id. at 300.

There is no doubt that students at UW-Madison, absent an opt-out provision, are compelled to fund speech with which they disagree. Judge Wood's analytical framework is incorrect when she writes that:

> there is a dispositive difference for First Amendment purposes between requiring someone to fund a forum, and requiring someone to support the speech of any or all speakers who come to use the forum.

Southworth, rehearing denial at 1128.

This way of framing the question presupposes that UW-Madison is *either* requiring its students to fund a forum *or* requiring them to support the speech of individual speakers. While one might conceive of a forum in which this "either/or" analysis could be correct, it is not correct *here*. What the UW-Madison program does

is require the students to *both* fund a forum *and* support, i.e. fund, individual speakers.

Clearly, under the previous discussion, this "both/and" requirement is unconstitutional. The appellees have not challenged the funding of the constitutionally permissible (albeit perhaps unwise) aspects of the forum. They have only challenged the unconstitutionally compelled funding of political and ideological speech. We have seen that under the wisdom of the *Memorial and Remonstrance*, UW-Madison would have been better off not funding political and ideological speech at all. However, having done so, it must allow an anti-compulsion opt-out. Once again, this reflects exactly the situation anticipated by Justice O'Connor and it is exactly the solution required by the panel.

Justice O'Connor's comments in her *Rosenberger* opinion also point out that the opt-out provision is available here where it might not be available in a pure taxing situation. *Rosenberger*, 515 U.S. at 851(O'Connor, J., concurring). This is another reason why the principle of freedom of conscience is easier to apply in a non-establishment of religion context: the debate between Justices Thomas and Souter over whether the *Memorial* was primarily addressing equality need not be resolved in favor of either view since that particular principle of the *Memorial* is not applicable to student fees. While the freedom of conscience must be honored in both situations, the present case at least has one complicating factor that can be eliminated.

Furthermore, the opt-out satisfies not only the view of James Madison in the *Memorial and Remonstrance*. Rather it satisfies the view of this Court on the question of conscience, as well. The opinions of this Court upon which the panel relied in its analysis all reflect the same concern Madison expressed in the *Memorial*. In canvassing, *Abood*, *Keller*, and *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, the panel noted several times the key passage from *Abood* and it use by the *Glickman* Court:

> Relying on our compelled speech cases, however, the [*Abood*] Court found that compelled contributions for political purposes unrelated to collective bargaining

> implicated First Amendment interests because they interfere with the values lying at the "heart of the First Amendment[--]the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped *by his mind and his conscience* rather than coerced by the State." (quoting *Abood*, 431 U.S. at 234-35).

Southworth, panel decision, at 731 (quoting *Glickman*, 521 U.S. at ___, 117, S.Ct. at 2139).

An reexamination of the longer *Abood* passage quoted on pages 4-6, *supra*, through the lens of the freedom of conscience yields an interesting result. The first sentence addresses compelled funding:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes [as was the case in Buckley v. Valeo, 424 U.S. 1 (1976)] works no less an infringement of their constitutional rights.

Abood, 431 U.S. at 234 (footnote omitted).

However, the next portion of the quotation speaks the language of the freedom of conscience:

> For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. See Elrod v. Burns, supra, at 356-357; Stanley v. Georgia, 394 U.S. 557, 565; Cantwell v. Connecticut, 310 U.S. 296, 303-304. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:
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> > "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe

> > what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642.
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> These principles prohibit a State from compelling any individual to affirm his belief in God, Torcaso v. Watkins, 367 U.S. 488, or to associate with a political party, Elrod v. Burns, supra; see 427 U.S., at 363-364, n. 17, as a condition of retaining public employment.

Abood, 431 U.S. at 234-35.

It is only thereafter that the *Abood* Court analyzed the compelled funding facts before it:

> They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher. We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Id. at 235 (footnote omitted). The Court was clearly analyzing a compelled funding of speech case through a freedom of conscience lens.

The panel's application of the *Glickman/Abood* principle to the facts of the instant case is what was dispositive.

> In essence, allowing the compelled funding in this case would undermine any right to "freedom of belief." We would be saying that students like the plaintiffs are free to believe what they wish, but they still must fund organizations espousing beliefs they reject. Thus, while they have the right to believe what they choose, they nevertheless must fund what they don't believe.

Southworth, panel decision, at 731. We note as we did at the outset that this analysis is dispositive whether the case is decided under the *Lehnert* test or upon first principles.

Because Judge Wood did not look at the UW-Madison program through a freedom of conscience lens she identified the wrong element of the case as being dispositive. Similarly, Judge Rovner and the Ninth Circuit's *Rounds* opinion also failed to use the freedom of conscience vantage point and came to erroneous conclusions.

B. THE DISPOSITIVE ISSUE IS NOT ATTRIBUTION

Judge Rovner thought the critical issue was attribution. *Southworth, rehearing denial*, at 1125-26. She attempted to distinguish *Abood* and *Keller* on the ground that in those two cases "the recipients of the funds were themselves engaging in the challenged speech . . . [whereas] the recipient of the funds in this case is not itself engaging in the challenged speech, nor is that speech even attributable to it." *Id.* at1125. Judge Rovner repeatedly came back to this point and also pointed out that the appellees conceded that the funding arrangement is designed to create a forum and that they do not object to that. *Id.*

However, this brief has already addressed the fact that the UW-Madison program *both* creates a forum *and* compels speech. Because Judge Rovner missed the freedom of conscience vantage point, she concentrated on the issue of attribution. However, the key

factor in this Court's freedom of conscience/compelled speech jurisprudence is not attribution but rather contribution. Furthermore, the locus of the inquiry should not be on the recipient of the funds, but rather on the one who is compelled to give.

C. THE DISPOSITIVE ISSUE IS NOT WHETHER THE SPEECH IS "PERSONAL"

Finally, missing the freedom of conscience vantage point also led the Ninth Circuit to the wrong conclusion in *Rounds*. It is true that the *Rounds* court purported to distinguish its case from the instant case on factual grounds. *Rounds*, 166 F.3d 1040. Since there is a split in the circuits on the issue of student fees and since *Rounds* was decided subsequent to the issuance of the panel decision in this case, its analysis is "on the table."

It is important to note that its rational is flawed. The key for the *Rounds* court was whether the speech was "personal":

> Further, the challenge in this case does not present an instance of compelled *personal* speech, for no *personal* speech is compelled from anyone. No student is required to "confess by word or act" belief in any message, as was the case in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943). Nor is any student required to act as a courier for an ideological message, as was the case in Wooley v. Maynard, 430 U.S. 705, 715 (1977).

Rounds, 166 F.3d at 1038 (fotenote omitteed) (emphasis added).

In this assertion, the Ninth Circuit committed two errors. First, it is not true that the students were not required to "confess by word or act" a belief. They were required to "confess" a belief by the act of funding it. Second, by inserting the word "personal" in its description of the speech in question, the *Rounds* court introduced a foreign element into its compelled speech analysis. As this brief has demonstrated, neither Jefferson and Madison nor this Court has ever found the personal nature of the speech to be the critical element in assessing the validity of a measure. Over and over again, the

concern has been quite the opposite: one's freedom of conscience can be violated when one is compelled to give one's money to pay for someone else's speech. Because the *Rounds* court did not look through the lens of the freedom of conscience, it missed this point altogether. Instead, it lighted upon the rather unique aspect of Mr. Maynard's license plate and ignored the vast majority of compelled speech cases.

CONCLUSION

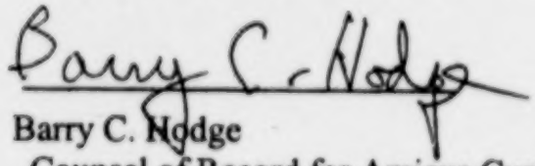
We end where we began. The heart of this case is a dispute that was settled long ago by those who founded this nation: government cannot compel individuals to endorse or pay for ideas that violate their freedom of conscience. Here, the UW-Madison student fee program does just that. Under the political theory upon which this nation was founded and under the precedents of this Court, the mandatory funding of political and ideological speech with which individual students disagree is clearly an unconstitutional compulsion.

When the writings of Founders such as Jefferson and Madison and the precedents of this Court are examined from the additional vantage point of freedom of conscience, we avoid certain analytical pitfalls. First, we see that the opinion of the Seventh Circuit panel is not in conflict with this Court's opinion in *Rosenberger*. Rather, the panel arrived at the only possible decision that was in harmony with *Rosenberger*.

Second, we avoid incorrect frameworks that can only lead to the wrong conclusion. The key is not forum-creation. It is not attribution. It is not the personal nature of the speech. The key is instead the simple proposition stated so long ago by Thomas Jefferson and reiterated by this Court in *Abood*: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." *Abood*, 431 U.S. at 234 n.31.

In light of the foregoing this Court should affirm the decision of the Seventh Circuit.

Respectfully submitted
this 13th day of August, 1999.



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BRIEF OF AMICUS FIRST FREEDOMS FOUNDATION IN SUPPORT OF RESPONDENTS

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PERIODICALS

INTEREST OF AMICUS CURIAE[1]

The First Freedoms Foundation is a non-partisan, not-for-profit, public interest organization founded to promote and defend individual civil liberties. The Foundation engages in research, public education, and public interest litigation.

Among its founding principles, the Foundation is concerned that expanding government progressively displaces private, voluntary systems of economic and social interaction. This displacement erodes and distorts the free market of ideas by forcibly directing private resources away from ideas which citizens themselves would otherwise choose to support. Instead, government uses those resources to support its own institutions and *fora* which tend inherently to discourage or prohibit advocacy of certain types of viewpoints -- for example, principles of limited government and theistic points of view.

The Foundation believes that the University of Wisconsin's coercion of students to support ideas they find abhorrent is particularly dangerous to First Amendment values and free society. The Foundation therefore respectfully offers its views that (1) historically, freedom of thought in higher education has been preserved by individuals pursuing truth for its own sake, not by government or ecclesiastical institutions controlling inquiry based on the perceived needs of those institutions or of society and (2) the University's forced

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was authored by counsel for *amicus curiae* and was not authored or contributed to by counsel for a party or by any other person or entity, either in whole or in part. Costs of submission of this brief in this Court have been underwritten by *amicus curiae*.

redistribution of students' resources disrupts and distorts individual participation in the free market of ideas.

INTRODUCTION

For millennia, learned men and women have struggled to pursue Truth wherever it leads. For even longer, prince and pope have struggled to restrain and subvert that pursuit for their own ends. The history of speech in the university is a history of that contest -- the struggle of scholars to pursue truth without restraint or subversion.

Throughout history, whether in the university or outside it, the single, indispensable constant in the marketplace of ideas has been that insistence and persistence of individual minds to pursue truth -- for no other reason than truth for its own sake and for their own integrity.

That principle is the essence of the First Amendment's protections and is the principle upon which this case should be decided. The University claims that compelled support for abhorrent ideas is necessary to change the content of the marketplace of ideas for the "greater good." But the pursuit of truth must never be sacrificed to official orthodoxy, whether religious or (as at present) social and political. The individual mind and conscience must always remain holy and inviolable. The University's forced subsidy of abhorrent ideas ought not stand.

I. IN THE HISTORY OF THE UNIVERSITY, THE SEARCH FOR TRUTH HAS DEPENDED ON THE CONSCIENCE OF THE INDIVIDUAL SCHOLAR

Assessment of mandatory student fees by government

universities to support student speech has emerged only recently as a widespread practice. *See,* e.g., Wiggin, A FUNNY THING HAPPENS WHEN YOU PAY FOR A FORUM: MANDATORY STUDENT FEES TO SUPPORT POLITICAL SPEECH AT PUBLIC UNIVERSITIES, 103 Yale L. J. 2009, 2011 (1994) (student fees at U.C. Berkeley appeared only about forty years ago).

This Court has indicated that it will consider the constitutionality of that practice under the rubric of cases dealing with fees compelled by labor unions and professional associations. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 840 (1995) (*citing Keller v. State Bar of California*, 496 U.S. 1, 15 - 16 (1990) and *Abood v. Detroit Board of Ed.*, 431 U.S. 209, 235 - 236 (1977).

However, even though *Abood* and *Keller* may ultimately provide the First Amendment's controlling principles, a university campus is a very different place with very different functions than labor unions or professional associations. Rather than duplicate the parties' discussion of *Abood* and *Keller*, *amicus* suggests that those cases should be applied within the historical context of the institution under scrutiny. (Establishment clause issues have been similarly considered in an historical context. *Everson v. Board of Education*, 330 U.S. 1, 33 (1947) (J. Rutlege, dissenting).

A. The Archetypes.

Socrates and Plato's Academy are the archetypes of those seeking truth for its own sake. This tradition has never concerned itself with the "social utility" of the search for truth, much less has it tolerated the state dictating the manner in which those who seek it must spend their time and resources.

In the *Apologia*, Socrates states, "Men of Athens, I honor and love you, but I shall obey God rather than you, and while I have life and strength I shall never cease from the practice and teaching of philosophy . . . . [A]re you not ashamed of heaping up the greatest amount of money and honour and reputation, and caring so little about wisdom and truth and the greatest improvement of the soul . . . . " APOLOGIA, reprinted in TEN GREAT WORKS OF PHILOSOPHY 24 (Robert Wolff, ed., 1969).

Plato's Academy maintained the same, dire independence from political fashion. It "did not exist in any immediate way for the benefit of the community; indeed, Plato and his pupils commonly were at odds with their community, in a political sense. The allegiance of the Academy was to something grander even than Athens: to Truth." RUSSELL KIRK, ACADEMIC FREEDOM 12 (1955). In fact, the "community" put "the first of its great thinker to death, forced the second to flee to Magara and Syracuse, and compelled the third, on occasion, to take refuge in Asia." *Id.*, at 11.

Thus, freedom of thought was historically grounded on the individual's pursuit of truth for its own sake and that of the seeker -- often in direct antagonism to the community and its institutions. The University's current efforts to subordinate individual judgment to the "greater needs" of the community is therefore a subversion of the very truth it purports to seek.

B. The Medieval University.

Medieval universities were "centers of power and prestige, protected and courted, even deferred to, by emperors and popes." RICHARD HOFSTADTER AND WALTER METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES

5 (1955)[2]. They were "autonomous corporations, conceived in the spirit of the gilds" which maintained independence by existing in the "interstices of medieval society," playing pope and king against each. *Id.* at 6, 7. Further, the masters' poverty made valid the threat to cease lectures and migrate, costing those who offended them prestige, power, and valuable trade brought by students. *Id.* at 6.

Yet the very autonomy of the university allowed the gild structures to exercise restraint against their own members. *Id.* at 12. Individual scholars also intimidated each other with personal attacks and accusations of heresy. *Id.* at 28. And in the fields of theology and philosophy, scholars searched for truth within narrowly fixed limits created by fundamental, unquestionable religious doctrines. *Id.*

Still, harmonizing Greek and Christian thought left fertile ground for creative thinking and forceful dispute. *Id.* at 14. To avoid suppression, scholars developed the "disputation," a device to acceptably propose unorthodox propositions in hypothetical form. *Id.* 14, 20. Scholars also read Aristotle in secret, flaunted bans, fled to jurisdictions of sympathetic sovereigns, and published speculative writings under assumed names. *Id.* at 21, 24, 28. Abelard justified interrogations which caused doubt on the grounds that they led to inquiry which led to truth. *Id.* at 29.

In contrast to Aquinas who escaped censure by harmonizing Christianity and Aristotle, Averoess (and later, Siger de Brabant) escaped it by assigning the natural order to philosophy and reason and the supernatural order to theology

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[2] Hofstadter and Metzger's work is the acknowledge authoritative source on the history of academic freedom and is cited extensively.

and faith. *Id.* at 33. This duality was perhaps the earliest form of free thought, allowing speculation based upon natural reason outside the confines of theological dogma. *Id.* 33 - 37.

Despite these difficulties and ruses, the scholars' autonomy and achievement ultimately arose from their service to truth, not to the community.

> [I]n the Middle Ages, as in classical times, the academy possessed freedom unknown to other bodies and persons because the philosopher, the scholar, and the student were looked upon as men consecrated to the service of Truth . . . . The community did not create the privileges of the Academy any more than the community created wisdom; rather, the community simply recognized the justice of the Academy's claim to privilege. The community did not expect to be served, except in the sense that it might be so fortunate as to gather some crumbs that feel from the academic table. Like Socrates and like Aquinas, the learned man, the teacher, was a servant of God wholly, and of God only. His freedom was sanctioned by an authority more than human.

ACADEMIC FREEDOM, *supra* at 17 - 18.

C. Renaissance and Reformation.

As the Reformation dawned, papal power declined as Reformers and Counter-Reformers appealed to civil authority for protection. But as sovereigns became champions and protectors, the balance of power which had previously allowed autonomy from both pope and prince was lost. *Cujus regio* placed conscience and intellect at the service of the state.

Finally, as the Church's power and universality waned, so did the ecclesiastical nature of intellectual life and its extra-nationality. Nation states emerged in the vacuum of papal power, exercising control over universities whose masters were now financially dependent upon them. THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES, *supra* at 38 - 39.

Aristotelianism itself became a new dogma, against which humanistic scholars revolted through the hypothetical statement and "probabilism," a device by which one could challenge the rationality of any orthodoxy without conclusively denying it. *Id.* 36 - 37. Duality evolved as a method to protect theology from the effects of skepticism and science (or *vice versa*, depending upon one's allegiances). *Id.* 38 - 39.

Those devices ultimately cost theology intellectual respect, and as belief in the universities' divine sanction waned, so did their power. Although the Italian universities exercised some leadership, the intellectual torch passed to new humanistic scholars outside the university and the Church who were protected and supported by patrons, sovereigns, and the papal court itself. *Id.* at 43 - 44.

In Italy, this new freedom from the Church gave rise to thinly veiled skepticism. In the north, the Christian humanists retained allegiance to the Church, but demanded broader scholarship and study of original sources which they believed would more effectively establish the faith and the original, ethical spirit of Christianity. But the humanist's insistence on examining original sources was opposed by churchmen who correctly foresaw that resort to original sources would undermine church authority. Erasmus and humanist scholars remained largely outside the universities rather than suffer restrictions of the churchmen's opposition. *Id.*, at 46 - 49.

In the early 16th century, Reuchlin, a Hebrew scholar, opposed an edict to destroy all Jewish sources, and a group of humanists circulated a scathing *ad hominem* against the edict's supporters. This effort is the first known instance of scholars rallying in general support of the scholarly enterprise. Erasmus issued a letter calling for respect of the search for truth and for other sincere scholars which, while not persuasive in its time, was the first singular statement of the spirit of freedom for *bona fide* intellectual inquiry. *Id.* at 50 - 52.

The labors and persecutions of Copernicus and Galileo are well known, but less known is that courageous defenders arose within the Church itself. Campanella's DEFENSE OF GALILEO was "the first reasoned argument to be published in support of the freedom of scientific investigation." THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES, *supra* at 57. It asserted that proper authority existed to question Ptolemaic geocentrism (long since incorporated in church dogma) and that suppression of God-given faculties of sense and reason transgressed the "natural law of God." *Id.*, at 58.

Campanella also expressed the first germ of "marketplace" theory ("If Galileo's theory be unsound it will not endure") and introduced the phrase "*libertas philosophandi*," the forerunner of "academic freedom." The Church ignored Campanella's argument, suppressed Galileo, and drove scientific inquiry outside the universities into private scientific societies where scholars pursued truth in greater freedom until well into the 18th century. *Id.* at 60 - 61.

Thus, in preserving intellectual inquiry during the Renaissance and Reformation, the constant was not the institutions of church, state, or university but, as before, was individual commitment to truth.

D. The Enlightenment.

The Reformation's threat to the Church initially led to suppression of inquiry and intellectual freedom in both camps, lest questioning be taken for doubt and doubt be taken for admission of error. Academic autonomy began its slow re-emergence only after religious tolerance began to take hold -- the result of rising commerce, protests of religious minorities, pleas for tolerance and freedom from secularists and ethical Christians, and civil authorities demanding order after two centuries of havoc. *Id.* at 58 - 62.

Academic and religious freedom thus grew side by side because they had "one root in common: both are based upon the freedom of conscience, hence neither can flourish in a community that has no respect for human individuality." *Id.* at 62. The freedom that arose, however, was one of mutual accommodation among internally orthodox institutions. Scholars could choose their religion, but individual institutions generally attempted to enforce their own orthodoxy within their confines.

As academic and religious toleration grew, several principles of modern intellectual freedom grounded in individual rights began to crystallize: (1) the ultimate appeal to individual conscience and reason, which was inevitable once open competition among sects became possible, (2) charity or "tolerance" of other opinions, urged by humanists as being more faithful to Christian ethics, (3) "fallibilism," the recognition that man is prone to error and that no one individual can presume himself an exception with the right to enforce his opinions on others, (4) the conviction that injurious actions, not wrong opinions, were the only proper subjects for prosecution or penalties and (5) secular morality, the belief that

a common morality is available to all by natural reason, and that right doctrine is not its indispensable prerequisite. *Id.*, at 64 - 67.

As in earlier epochs, freedom to pursue truth again survived because of the adamance and perseverance of individual scholars, in spite of the religious and political institutions which abused and suppressed them.

E. The American Experience.

History has emphasized religion's abuses of intellectual liberty. However, as soon as it came to power, the "republican" state proved itself no less capable of controlling scholars for its own ends. Early American universities were, without exception, denominational seminaries created primarily for training of ministers. But as republicanism swept across the Atlantic, the universities became political prizes contested by opposing political, religious and social factions.

William and Mary, for example, was an integral part of the Virginia Anglican establishment. But in 1776, Thomas Jefferson introduced a bill in the Virginia legislature to change the college's corporate charter, eliminate divinity from the curriculum, and render it a republican institution to develop political and social leaders for republican society. Jefferson was defeated by Anglican and other religious interests, but he partially implemented his plan as governor in 1779. He saw it completely realized in 1819 with the creation of the University of Virginia.

While Jefferson was devoted to intellectual freedom of the faculty, his devotion clearly did not extend to those faculty who thought that the study of divinity was important. GEORGE M.

MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY 54 (1994); Mark D. McGarvie, CREATING ROLES FOR RELIGION AND PHILANTHROPY IN A SECULAR NATION: THE DARTMOUTH COLLEGE CASE AND THE DESIGN OF CIVIL SOCIETY IN THE EARLY REPUBLIC, Vol. 25, No. 3, J.C. & U.L. 527, 537 - 38 (1998).

The late 18th and early 19th centuries saw the same struggles repeated throughout the states. In Massachusetts, after a long battle for state control, the legislature finally granted Harvard its independence. It ceased supporting Harvard and, instead, provided funding for "republican" Williams and Bowdoin colleges. (This measure did not satisfy Boston's republican editors who continued demanding that the state take control of Harvard.) McGarvie, *supra* at 541.

In 1819, *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819) became a watershed in the struggle for control of the universities. Corporations had long been created solely for public purposes and only by direct legislative action. However, Chief Justice Marshall established that corporations could be a private, voluntary associations outside state control, even if they were created for public or charitable purposes. McGarvie, *supra* at 555.

Thereafter, legislatures aggressively pursued direct legal control of colleges and their faculties. At Maine's 1819 constitutional convention, one delegate proposed that no school should receive support unless "the Governor and Council shall have the power of revising and negativing the doings of the trustees and Government of such Institution . . . ." *Id.* at 563 (quoting JEREMIAH PERLEY, THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS OF THE CONVENTION OF THE DELEGATES ASSEMBLED AT PORTLAND ON THE 11TH AND CONTINUED UNTIL

THE 29TH DAY OF OCTOBER, 1819, FOR THE PURPOSE OF FORMING CONSTITUTION FOR THE STATE OF MAINE 281 (Charles E. Nash, ed., 1920) (1894).

But another delegate expressed the historic abhorrence against external control of the pursuit of truth. He was "mortified," and accused the state of "imposing shackles" on the college. "Are we too ignorant even to be made sensible of the importance of knowledge? And does Massachusetts therefore undertake to prescribe for us?" MCGARVIE, *supra* at 564 (quoting PERLEY, *supra* at 290).

Thus, as the secular state supplanted organized religion as the primary social power, it was just as eager as the Church to take control of the university. As before, it was neither church nor state which protected the pursuit of truth, but individuals dedicated to its pursuit for its own value.

F. Modern Zealotry.

Modern academe claims great progress in protecting intellectual freedom. But the integrity of intellectual inquiry is under no less threat today than before. NEIL HAMILTON, ZEALOTRY AND ACADEMIC FREEDOM 55 (1995).

> Zealotry hostile to freedom of academic thought and speech has historically originated in a variety of sources: lay boards of trustees and administrators, the lay public, government, and, in the 1960's, students. The newest threat is from the group that academic freedom was designed to protect: the professoriate itself. *Id.*

A recent symposium collected papers examining

McCarthyism, "1960's Student Activism" and "1990's Faculty Fundamentalism." Hamilton, SYMPOSIUM ON ZEALOTRY AND ACADEMIC FREEDOM 22 Wm. Mitchell L. Rev. 331 *et seq.* (1996). The rabid demand for "relevance" in the 1960's led ineluctably to political correctness in the 80's and 90's -- the ultimate "triumph" of defending scholarship based on perceived social utility rather than the absolute right and value of pursuing truth for its own sake.

G. The University of Wisconsin Experience.

The University of Wisconsin has been subject to the same pressures against individual pursuit of truth as every other institution throughout history. Although the Regents have attempted to synthesize the pursuit of truth for its own sake with its pursuit for the sake of social utility, the tension between those objectives is inevitable and problematic.

The University is a land grant university created and governed by the state through its Board of Regents, and epitomizes the view that a university should serve the needs of the state. "The Wisconsin idea" is that "the boundaries of the campus are the boundaries of the state." W. LEE HANSEN, ACADEMIC FREEDOM ON TRIAL 15 (1994).

During a 1957 ceremony rededicating a plaque in front of Bascom Hall (the University's "seat of power"), the Regents stated that they were attempting to "employ with utmost energy the power of truth and freedom for the benefit of mankind." *Id.* at 6. On the rededicated plaque are engraved the following words:

> WHATEVER MAY BE THE LIMITATIONS
> WHICH TRAMMEL INQUIRY ELSEWHERE, WE

> BELIEVE THAT THE GREAT STATE UNIVERSITY OF WISCONSIN SHOULD EVER ENCOURAGE THAT CONTINUAL AND FEARLESS SIFTING AND WINNOWING BY WHICH ALONE THE TRUTH CAN BE FOUND." (TAKEN FROM A REPORT OF THE BOARD OF REGENTS IN 1894.) MEMORIAL, CLASS OF 1910.

Id. at 66 - 67.

Despite their uncompromising tenor, those words have an equivocal history. ACADEMIC FREEDOM ON TRIAL was published in 1994 as a centennial commemoration of the watershed investigation of Professor Richard T. Ely who was director of the University's School of Economics, Politics and History in 1894 -- the year of the Pullman strike, a national depression, and exceptional social unrest. Though he was apparently a social conservative and a devout "social gospel" Christian, Wisconsin's Superintendent of Pubic Instruction, Oliver Wells, publicly attacked him as being morally unfit, an anarchist, and a union sympathizer and instigator of boycotts.

After a hearing before a committee of the Board of Regents, Ely was fully exonerated. Although the incident galvanized support for Ely's right to address economic and labor issues (Frederick Jackson Turner was a faculty member under Ely's direction and an ardent defender), Ely did not defend against Wells' charges on the grounds of academic freedom. Instead, he mounted a "prudential" defense, denying the specific charges but conceding that, if the charges were true, his dismissal was warranted.

To the committee's credit, it issued a report which asserted

academic freedom. "In all lines of academic investigation, it is of the utmost importance that the investigator should be absolutely free to follow the indications of truth wherever they may lead." *Id.* at 67. The words inscribed on the Bascom Hall plaque were lifted directly from the report and, in Ely's own words, they became "a beacon of light in higher education in this country" and a "part of the Wisconsin Magna Charta."*Id.*

"Continual and fearless sifting and winnowing" have been University watchwords ever since. Nevertheless, Ely's pusillanimous defense illustrates the perennial pressures to restrain aggressive inquiry which challenges the status quo.

In 1927, for example, the University opened its "Experimental College," a dramatic experiment in freedom of inquiry under the direction of Alexander Meiklejohn. Students lived and worked with staff in the same dormitory, had an exceptional reading program but no exams, produced their own plays and literary works, participated in the state legislative process, engaged in political demonstrations and, in general, exhibited "uninhibited zest for thought and for action" to which the regular university was not accustomed. ALEXANDER MEIKLEJOHN: TEACHER OF FREEDOM (Cynthia Stokes Brown, ed.) 22 - 23 (1981).

The Experimental College closed in 1932, not only for a lack of funding, but because of pereniall problems which have always inhibited free thought. A small but vocal contingent of communist students was continually monitored in the state press. (One member arrested in a Milwaukee labor demonstration later ran for governor of Wisconsin from his residence in the Milwaukee County House of Correction.) When the University refused to permit Bertrand Russell's wife to speak on campus because she advocated premarital sex, the

College formed a Free Speech Club and arranged for her to speak in the Unitarian Church. She was the Meiklejohns' guest, as Bertrand Russell had been the previous year, and the Meiklejohns were ostracized by the Madison community.

Parents were also concerned that their sons (the College admitted only men because co-ed dormitories were impermissible) were not being properly prepared for a position in the tight Depression era labor market. Others were deterred by the high percentage of Jewish students the College attracted. There were tensions within the University itself as the College of Letters and Sciences continued to demand examinations and grades. Professional rivalries developed with faculty not involved in the College, and Meiklejohn himself was at odds with the University because of its reluctance to experiment.

Resentful faculty, students and administrators spread rumors that the College would be abandoned -- which it shortly was when its faculty refused to make program concessions requested by a committee from Letters and Science. President Glenn Frank refused to support the College because he had no support within the community. The Regents removed him five years later without due process and with no protest from faculty. *Id.* 20 - 35.

At present, the University congratulates itself that these unfortunate incidents are ancient history and that it has developed faculty rights and due process which prevents them from happening again. FREEDOM ON TRIAL, *supra* at 5 - 8 and *passim*.

Others, however, suggest that the situation may be worse than ever. The 1970 class of *alumnus* Dr. Mordecai Lee, for example, never even participated in a graduation ceremony

because student radicals were allowed to shut down the University. ACADEMIC FREEDOM ON TRIAL, *supra* at 209. University Professor E. David Cronon states that

> For nearly three decades since the turbulent protests against the Vietnam War,[3] it has been risky and sometimes impossible to invite to the campus speakers whose unpopular ideas are opposed by one student group or another, lest they be heckled, shouted down, or even physically threatened. The result is a self-imposed censorship and conformity that denies the campus community the opportunity to hear all points of view. It makes a shameful mockery of the sifting and winnowing ideal.
>
> What is more disturbing is that it has been a long time -- decades, in fact -- since the faculty as a body, or a top campus administrator, or a regent has spoken out forcefully and taken a strong stand against this form of censorship by student storm troopers.

Id. at 249.

More recently, the University adopted its infamous "Hate Speech Code" in 1989 which was eventually ruled unconstitutional by District Judge Robert Warren. *Id.* at 216 - 20. Dr. Lee himself expresses the tension inherent in any university created expressly to serve the state.

The UW-Madison faculty may wish for the

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[3] Perhaps the most tragic event in University history was the death of a graduate student killed when student radicals bombed the University math center which they believed was conducting military research.

academic freedom of their counterparts in private institutions. But, the context of their academic freedom, as part of a state government, means that the academic freedom they get is somewhat different. The UW faculty needs to recognize this reality of being part of state government and develop a concept of academic freedom consistent with it.

Quality teaching, community service, and applied research are what the taxpayers want in return for their investment. The cry for the "relevance" that typified the student protest movement in the sixties is returning, and now it is coming from the people who hold the purse strings. *It is time to redefine what academic freedom means in a public university in the 1990's.*

Id. at 215. (Emphasis added.)

These regrettable anecdotes demonstrate once again that preservation of bold, original inquiry will never lie in a group or in an institution. Instead, it will always lie with individuals, master and scholar alike, who follow truth where it leads them and who refuse to acquiesce or conform, regardless of current fashion.

H. Summary.

In summary, assaults on freedom of inquiry throughout history have come from all quarters -- from church, state, patron, students, fellow scholars, the university itself. The pursuit of truth has survived, not because of social, political or institutional commitment, but because individual scholars have defied fashion and authority to pursue the truth as they see it.

In this case, a few individual scholars have courageously challenged the University because it extracts from them fees to support ideas which offend their consciences. The greatest service this Court can render is to end that violation of conscience. The First Amendment does not and ought not countenance a soulless, bureaucratic program on the vacuous rationale that it is necessary to offend the conscience of one so that he will learn not to offend the conscience of another.

II. COMPELLED SUPPORT FOR ABHORRENT IDEAS DISRUPTS THE MARKETPLACE ESSENTIAL TO THE PURSUIT OF TRUTH

The University claims that coercing students to fund ideas they find abhorrent serves the greater good of expanding the "marketplace of ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). However, violating any individual's decision and conscience inevitably damages not only the violated individual, but also defeats the purposes the marketplace of ideas is intended to serve.

A. Granting Exemption from the Fee System Will Not Limit Speech at the University.

The University claims that granting exemptions to objecting students will endanger campus speech. But Respondents comprise only a handful of the University's 40,000 students. Funds lost by granting the exemptions would be infinitesimal. On the other hand, if such exemptions did spark a mass exodus by other students, such exodus would be compelling evidence of the fee program's injustice. The greater the exemption from the program, the greater the evidence that the views it subsidizes do not reflect the views of those compelled to support it.

B. The Fee System's Facial "Content Neutrality" Belies Bias Inherent in Selecting Which Groups Will Receive Funds.

Numerous scholars have noted the obvious problem that interference in the market by *any* governmental structure disturbs the free flow of ideas and has the inevitable effect of perpetuating the orthodoxies preferred by those in control of the structure. (*See, e.g.*, Brietzke, HOW AND WHY THE MARKETPLACE OF IDEAS FAILS, 31 Val. U.L. Rev. 951 (1997); Wonnell, TRUTH AND THE MARKETPLACE OF IDEAS, 19 U.C.D. L. Rev. 669 (1986); Ingber, THE MARKETPLACE OF IDEAS: A LEGITIMIZING MYTH, 1984 Duke L.J. 1 (1984).

The University's policy does just that. Although it contains no overt criteria discriminating against applicants based upon the content of their speech, it leaves to small student ommittees the final decisions over which groups will or will not receive funding. The policy does not (and, as a practical matter, can not) control the biases of those students empowered to make such decisions. Funding decisions thus inevitably reflect their individual preferences and value judgments.

C. The Fee System Is Subject to Abuses Characteristic of All Subsidized Programs.

The program is also subject to all-too-familiar abuses attendant in any program of governmental subsidy. For example, it clearly encourages *bolshevik* style efforts to control the committees empowered to make grant decision. It also encourages scheming by relatively few students to form a multiplicity of small, coordinated groups, thereby garnering and controlling a greater percentage of available funds.

The subsidies also bring into existence less valuable speech because the very rationale of the subsidies is that without them, faculty and students would see fit to utilize their existing resources to support speech other than that approved by the committees. The process thus substitutes the judgment of a small number of students for the individual of all other students.

Subsidies also ultimately confer disproportionate benefits on authoritarian students who have no qualms about taking the property of others to support their own ideas. Across the political spectrum, authoritarians hold in common the belief that government compulsion is morally justifiable to modify otherwise free choices of their fellow citizens. In contrast, the beliefs and consciences of individualists (such as libertarians and proponents of limited government) prohibit them engaging in such tactics The differing inhibitions of these groups make it inevitable that one will benefit more from subsidies or other forms of official compulsion than will the other.

The student fees program, like all forms of official compulsion, tips the scales in favor of those who employ political force rather than rational persuasion. As Justice Douglas stated, "When we force people to listen to another's ideas, we give the propagandist a powerful weapon . . . ." *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 469 (1954) (Douglas, J., dissenting). How much worse then, when government forces objectors not merely to listen to abhorrent speech, but to *pay* for it.

Further, as with other entitlements, the greatest injury done by the speech subsidies is not that inflicted upon those whose property is taken to support ideas they abhor, but is rather the injury inflicted upon those who receive the support. Such

recipients of intellectual welfare come to believe that their ideas are more merititorious than the free market warrants and that they are entitled to the support of others -- if not voluntarily, then upon pain of force and forfeiture. The tragedy is that the university community at large comes to believe that compulsion and subsidized thought is *rerum naturum*, and it loses the will to oppose the "storm troopers" of which Professor Cronin complains.

Finally, the University also argues that the students come to campus knowing that the fee system is in place. But this claim also admits that the University is tampering with the market. The very existence of the fee system is, in fact, an admission by the University that it is not satisfied in some respect with the quantity, quality, or diversity of viewpoints which would arise if students were left to themselves.

Further, it is doubtful that students are even aware of the arcane system of fees and disbursements when they come to campus. But even assuming that they are, there is no way to know whether they came *because* of it or *in spite* of it. It seems far more likely that those who oppose the system on grounds of conscience may be dissuaded from attending the University at all, thus actually limiting rather than broadening the range of ideas on campus.

D. The Fee System Damages Civility and Reason.

The University's relies heavily on the program's"content neutrality." One can only hope that the University does not really mean it.

The archetype colloquium was a community of masters and scholars, respectful of truth and of each other. But a truly

"content-neutral" process destroys respect for both. If the University persists in its program, even the most unsophisticated undergraduate will, in time, come to question its sincerity and, ultimately, its rationality.

Content neutrality destroys civility in two ways. "Substantively," if the process is truly neutral, then anyone must be eligible for funding irrespective of his teachings, no matter how pernicious. Does the allocation process really not distinguish between the Student Council and the Aryan Nation? Between the NAACP and the Ku Klux Klan? How can the University expect any student to respect a "content-neutral" process which forces him to subsidize vitriolic attacks against himself and principles he holds dear?

"Procedurally," campus debate should certainly vigorous. But a free, uncompelled exchange of ideas is the greatest guard of civility and market effectiveness because it requires two *willing* participants. In a voluntary exchange of ideas, just as in a free and open economic exchange, the audience can simply refuse to listen and walk away if judge the proponent to be absurd, abusive, disrespectful, inconsequential or insincere.

Compelled support for abhorrent ideas destroys that fabric on which the market depends. One forced to support an abhorrent idea has no chance to "walk away" from its proponent, regardless of how uncivil or irrational that proponent may be. In place of voluntary respect for truth and others, forced subsidy breeds pernicious resentment.

"Content-neutral" disbursement of funds also damages rationality. If the University is taken at its word, its methodology prohibits from distinguishing not only on a political basis, but on a rational basis as well. Refined thought

is afforded no greater chance of support than thought which is patently absurd. One is confronted with the Kafkaesque picture of the University standing beside its students, scooping up chaff and detritus, and dumping it back in the basket just as fast as the students can "sift and winnow" it out.

Amicus does not ascribe such irrationality to the University or the students making the funding decisions, nor does it suppose that there are no outer limits of rationality or decency which preclude some speech from being subsidized.

Instead, *amicus* suggests that any pledge of "content-neutrality" is at best naive and at worst disingenuous. Again, such patent defects breed disrespect for the University, for civility, and, ultimately, for reason itself.

CONCLUSION

As in many First Amendment cases, the symbolic effect of this Court's decision is as important as the substantive result. Granting students an exemption from fees to support speech they find abhorrent sends a critical message: an idea should survive because it is persuasive and because its adherents are committed, not because of their wretched ability to extract subsidies from those with whom they disagree.

Instead of a system of compelled support for ideas one finds abhorrent, the University should instill in students an unassailable, "Camelot"-like vision -- that they should convince others by their enthusiasm and the force of their arguments, not by exercising the power of the state to extract support from their opponents.

Justice Douglas expressed this ideal in the context of

religious ideas. This Court should "sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

The search for truth has always depend on the dogmatic, uncompromising, insistence of the single individual to think for himself. *Amicus* urges the Court to protect the true guarantor of the search for truth, the sanctity of the individual human mind.

Respectfully submitted,

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